



Comptroller General  
of the United States

Washington, D.C. 20548

120348

Benejam 149936

## Decision

**Matter of:** Sea-Land Service, Inc.

**File:** B-246784.6; B-253068

**Date:** August 5, 1993

Peter M. Klein, Esq., and James P. Moore, Esq., Sea-Land Service, Inc., and Raymond S.E. Pushkar, Esq., and Alison L. Doyle, Esq., McKenna & Cuneo, for the protester. Christopher K. Tankersley, Esq., Nemirow, Hu, Kurt & Tankersley, for Lykes Bros. Steamship Co., Inc., an interested party.

Richard S. Haynes, Esq., E. Duncan Hamner, Jr., Esq., Charna J. Swedarsky, Esq., and John M. Binetti, Esq., Department of the Navy, for the agency.

Aldo A. Benejam, Esq., and Christine S. Melody, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

### DIGEST

1. Where solicitations for negotiated contracts seeking ocean and intermodal rates for transporting Department of Defense cargo state that agency will evaluate proposals by comparing offered rates to commercial prices in publicly available "comparable service contracts," there is no requirement that the agency disclose in solicitations the specific commercial contracts or rates it intends to use in its evaluation.

2. Where solicitations for negotiated contracts seeking ocean and intermodal rates for transporting Department of Defense cargo state that the agency will evaluate proposals by comparing offered rates to commercial charges in "comparable service contracts" but do not specifically identify any service contracts the agency might use in its evaluation, protest allegation that the agency will improperly evaluate proposals is dismissed as speculative and premature, since the agency has not yet identified the comparable service contracts or applicable commercial rates it intends to use in evaluating proposals.

### DECISION

Sea-Land Service, Inc. protests the terms of requests for proposals (RFP) No. N00033-93-R-2400(A) (2400(A)), and No. N00033-91-R-2400(D) (2400(D)), issued by the Military

Sealift Command (MSC) for ocean and intermodal transportation services.<sup>1</sup> Sea-Land contends that the solicitations are defective because they contain ambiguous evaluation factors.

We deny the protests.

#### BACKGROUND

Traditionally, MSC negotiates ocean and intermodal transportation (ocean in combination with motor/rail) rates for transporting Department of Defense (DOD) cargo using United States-flag commercial carriers.<sup>2</sup> Under that procurement method, if MSC determines that the services of more than one carrier are necessary to meet DOD's transportation requirements on any route, MSC may accept more than one carrier's rates for transporting cargo between the same points--provided that such rates are fair and reasonable and otherwise in compliance with all applicable laws and regulations--making multiple awards possible for transportation services over the same routes. At the conclusion of these negotiations, MSC publishes the carriers' names and their accepted rates in the Worldwide Container Agreement and Rate Guide and the Worldwide Shipping Agreement and Rate Guide. Under the agreements, DOD transports its cargo on the carriers' regularly scheduled commercial routes, in the same ships, and at the same time as commercial cargo. As individual requirements are generated, DOD books cargo with

---

<sup>1</sup>RFP No. 2400(A) seeks proposals for transporting "Boxed Chilled Beef" for the Defense Commissary Agency (DCA) from the United States to Europe from July 4, 1993 through July 2, 1994. RFP No. 2400(D) seeks proposals for transporting various commodities for the Defense Personnel Support Center/Defense Logistics Agency (DPSC/DLA) from the United States to Europe from July 15, 1993 through May 31, 1994.

<sup>2</sup>MSC is the component within the Department of the Navy responsible for negotiating ocean cargo rates and serves as DOD's procuring and contracting office. Each procurement is termed a "cycle" and covers a 6-month period. Offers are based on (1) ocean route--further delineated as to the direction (outbound or inbound) in which cargo will move, broad type of cargo (general, refrigerated, or vehicles), and container size (20-foot or 40-foot) in which the cargo will be transported; and (2) land route or drayage area--that is, the route from (domestic inland) origin to port or from the port to the ultimate destination.

the carrier whose sailing schedule meets its needs, and whose rates listed in the agreements result in the lowest overall cost to the government.<sup>3</sup>

According to MSC, the solicitations at issue here are a departure from the established Worldwide Agreements approach, and reflect a new strategy to meeting DOD's transportation needs. MSC has determined that DCA's and DPSC/DLA's shipping requirements could best be met, and better rates obtained, by negotiating a contract with only one carrier, rather than negotiating with several carriers using the Worldwide Agreements approach. Accordingly, rather than making multiple awards as under the agreements, the solicitations at issue here contemplate awarding "service contracts"<sup>4</sup> to a single carrier.

---

<sup>3</sup>For a more detailed discussion of the Worldwide Agreements approach and DOD's cargo booking policy, see American President Lines, Ltd., B-236834.3, July 20, 1990, 90-2 CPD ¶ 53.

<sup>4</sup>The Shipping Act of 1984, 46 U.S.C. App. § 1702(21) (1988), defines "service contract" as:

"[A] contract between a shipper and an ocean common carrier . . . in which the shipper makes a commitment to provide a certain minimum quantity of cargo over a fixed time period, and the ocean carrier . . . commits to a certain rate or rate schedule as well as a defined service level--such as assured space, transit time, port rotation, or similar service features; the contract may also specify provisions in the event of nonperformance on the part of either party."

Whether the solicitations at issue here will ultimately result in contracts that the Federal Maritime Commission (FMC), the cognizant agency, will consider to be "service contracts" under the Shipping Act is a matter outside our bid protest jurisdiction and will not be considered in this decision.

## The Solicitations

Each solicitation contemplates awarding a firm, fixed-rate, indefinite delivery/indefinite quantity contract. Offerors are required to submit single factor and multi-factor<sup>5</sup> rates in accordance with instructions in each solicitation. For example, RFP No. 2400(A) requires offerors to submit multi-factor rates for transporting 40-foot containers of the boxed chilled beef from Norfolk, Virginia, the domestic base port, to various destinations in Europe listed in the RFP, covering 17 different routes. RFP No. 2400(A) states that the multi-factor rate is the sum of the following segments: (1) ocean freight rate from the domestic base port to European base ports; and (2) foreign line haul rates from European base ports to European (inland) destination points. RFP No. 2400(A) states that DOD will ship a minimum quantity of 728 40-foot equivalent units (FEU)<sup>6</sup> of refrigerated cargo during the term of the contract, and provides for liquidated damages if DOD fails to meet that commitment.

Under a section entitled "Carrier Rate Schedule and Serv. Commitments," RFP No. 2400(A) requires the carrier to guarantee various services such as: making available to the beef contractors a minimum and a maximum number of fully operable 40-foot refrigerated containers on a weekly basis at the carrier's depot; providing weekly sailings and guaranteed space aboard ship for 14 refrigerated containers; providing temperature recording devices and temperature reports while in transit; guaranteeing delivery time; and providing weekly delivery notification by telex or telefacsimile to various DOD offices of proposed dates and times for deliveries. The RFP imposes \$500/day in liquidated damages per container to be paid by the carrier to the government in the event the carrier fails to deliver the containers within the times specified in the RFP; provides for liquidated damages to be paid by the carrier if it fails to make available to the beef contractors the guaranteed number of containers at the carrier's depot; and provides

---

<sup>5</sup>"Single factor" rates are defined as "[a] single rate which includes all segments of the intermodal transportation move from origin to destination." "Multi-factor" rates are defined as "[a] segmentation of rates from origin point to final destination point, usually consisting of separate line-haul, ocean and line-haul rates."

<sup>6</sup>The acronym "FEU" is an industry term for cargo volumes transported in standard intermodal containers, 8 feet high, 8 feet wide and 40 feet deep.

for liquidated damages if the carrier fails to lift the containers as booked by MSC.

RFP No. 2400(D) requires offerors to submit single-factor rates for transporting 20-foot and 40-foot dry containers, and 40-foot refrigerated containers for cargo described in the RFP in the following combinations: (1) domestic (inland) origin point to European (inland) destination point; (2) domestic origin base port to European inland destination point; and (3) domestic (inland) origin point to European base port. The RFP also calls for separate ocean rates for shipping 20-foot and 40-foot dry containers and 40-foot refrigerated containers from domestic origin base ports to destination base ports. Annex A of the RFP lists the domestic origin and foreign destination base ports as well as the inland (linehaul) and European destination points; Annex B of the RFP lists the commodities to be transported, divided into two categories.<sup>7</sup> Attachment No. 7 to the RFP sets forth forecasted volumes of containers to be transported by trade lane.

RFP No. 2400(D) also sets forth minimum required service levels. For example, the RFP requires that the successful offeror guarantee total transit time from the domestic origin port to any inland destination in Europe and the United Kingdom of 20 and 21 days respectively; requires the carrier to provide space for 50 FEUs of dry containers per week and to guarantee to provide space for an additional 20 FEUs of dry containers for the same week if needed. The RFP sets forth similar requirements for refrigerated containers. The successful carrier is further required to provide the shipper, at least 6 days prior to the scheduled sailing, sufficient and suitable containers and chassis at domestic origin locations to permit the shipper to meet the volume commitment announced in the RFP. The RFP also sets 10 calendar days as the total amount of "free time" in Europe allowed for each dry container, and 7 calendar days for each refrigerated container. The RFP provides liquidated damages to be paid by the carrier if it fails to meet the 20/21-day delivery requirement, or fails to lift the guaranteed volumes listed in the RFP. As with RFP No. 2400(A), RFP No. 2400(D) also provides for liquidated

---

<sup>7</sup>The commodities listed under category I include, for example, bakery goods and preparations, canned goods, boxed cereal, cigarettes, paper products, and snack foods. Category II commodities include, for example, beef and beef products, dairy products, fresh fruit, juice and juice concentrate, pork, poultry, seafood and vegetables.

damages to be paid by the government if the shipper fails to meet the minimum volume cargo commitment.

The solicitations state that for evaluation purposes the government will compute each solicited rate separately using a formula announced in the RFPs. RFP No. 2400(A), for example, states that (1) the total cost of each movement for a 40-foot refrigerated container is the sum of the multi-factor rates from the domestic base ports to the European (inland) destination points for one 40-foot container, and that (2) the total cost of the offer is the sum of the 17 primary routes. RFP No. 2400(D) contains a similar approach, which essentially results in weighted rates, taking into account the estimated number of containers to be shipped from the distribution points to each destination point specified in the RFP. Each solicitation contemplates awarding a single contract to the overall low-priced, technically acceptable, responsible offeror meeting the solicitation's requirements.

#### PROTESTER'S POSITION

Sea-Land contends that the evaluation factors announced in the solicitations are defective. Specifically, Sea-Land points to paragraphs C.1 and C.3, identical evaluation factors contained in both solicitations, which state:

"[C.1] The government will not award a contract if the overall low cost offer after [best and final offers] contains rates higher than the highest commercial service contract rate, for which [United States] flag carriers are party to, for the same trades and similar service areas covered by this solicitation.

"[C.3] The contracting officer also reserves the right to not award a contract if the overall low cost offer after [best and final offers] contains service contract rates that are clearly and substantially in excess of the rates stated in comparable commercial service contracts, for which [United States] flag carriers are party to, for the same trades and similar service areas covered by this solicitation."

Sea-Land contends that the quoted provisions render the solicitations ambiguous because they fail to identify the commercial contracts or rates MSC intends to use in its evaluation. Central to its protests is Sea-Land's

contention that although the RFPs purport to establish an existing, known standard for evaluating offers, there are no "comparable service contracts" which the agency could reasonably use in evaluating offers. According to the protester, Sea-Land is not a party to nor is it aware of any commercial service contracts that could reasonably be characterized as similar to the contracts contemplated by the solicitations in terms of commodity mix, guaranteed service levels, delivery guarantees, liquidated damages exposure, reporting requirements, or freight payment terms.<sup>6</sup>

#### AGENCY'S POSITION

The agency maintains that the evaluation criteria Sea-Land challenges are unambiguous and are based on common carrier industry-wide pricing practices. MSC further argues that paragraphs C.1 and C.3 of the solicitations reflect basic price analysis methodology allowed by Federal Acquisition Regulation (FAR) § 15.805-2(d), which authorizes the contracting officer to select whatever price analysis techniques will ensure a fair and reasonable price. MSC argues that the contracting officer is thus authorized to make the type of comparison contemplated by the solicitations, as long as she uses sound business judgment in selecting appropriate commercial service contracts for comparison.

The agency states that one of its concerns in developing the solicitations was that comparisons to commercial service contracts for evaluation purposes be meaningful. MSC explains that the basis for comparison was deliberately limited to commercial service contracts to which United States-flag carriers are a party, and which cover the North Atlantic ocean trade route for cargo moving from domestic cargo staging areas to foreign inland destination points. MSC maintains that, contrary to the protester's contentions, such comparisons reasonably may be made, and constitute a rational price analysis method authorized by FAR § 15.805-2. MSC urges that as long as the resulting comparison is

---

<sup>6</sup>In its original protest of the terms of RFP No. 2400(A), Sea-Land also challenged as ambiguous the terms of evaluation factor "E" of that RFP. The agency responded that evaluation factor "E" is a standard provision that has been included in every solicitation for transporting refrigerated beef to Europe for several years, and with which Sea-Land, as an experienced carrier, is familiar. In commenting on the agency report, the protester did not take issue with the agency's response; we therefore consider Sea-Land to have abandoned this aspect of its protest. Ariay Elecs. Corp., B-243080, July 1, 1991, 91-2 CPD ¶ 3.

reasonable, the contracting officer should be accorded broad discretion in selecting the price analysis method deemed most appropriate for the procurement.

MSC also asserts that Sea-Land's argument that there are no comparable commercial service contracts which the agency could reasonably use in its evaluation is without merit because: (1) if at the time offers are evaluated there are no active commercial service contracts on file with the FMC that could reasonably be the subject for comparison, then no offer would be rejected on that basis; (2) Sea-Land speculates that the alleged absence of comparable service contracts will continue to exist through the evaluation of offers; and (3) since it is MSC's position that "comparable" does not equate with "identical," a reasonable comparison of offered rates to commercial service contracts may be made by the contracting officer taking into account any differences in terms and conditions during the evaluation.

MSC asserts that the determination of "comparability" of service contracts within the context of these solicitations is a matter within the contracting officer's professional business judgment, exercised based on a review of published service contracts existing at the time of the evaluation. The agency asserts that the RFPs are not ambiguous simply because MSC has not identified the specific service contracts that will be used for comparison, or because the RFPs contemplate comparing offers to commercial service contracts that may not be identical to the terms of the solicitations. Citing several decisions of our Office,<sup>9</sup> MSC concludes that a small degree of uncertainty in the evaluation process should not render the solicitations materially defective.

#### DISCUSSION

There is nothing inherently unreasonable about the rationale which forms the basis for MSC's evaluation methodology--conducting procurements which parallel commercial sector service contracts. See Sea-Land Serv., Inc., B-246784.2, Aug. 24, 1992, 92-2 CPD ¶ 122. Nor is it unduly restrictive of competition for an agency to predesignate pricing

---

<sup>9</sup>RMS Indus., B-248678, Aug. 14, 1992, 92-2 CPD ¶ 109; RMS Indus., B-247465; B-247467, June 10, 1992, 92-1 ¶ 506; and C3, Inc., B-241983.2, Mar. 13, 1991, 91-1 CPD ¶ 279.

ings in order to protect legitimate government interests. See Orthopedic Servs., Inc., B-247695, June 30, 1992, 92-1 CPD ¶ 547, citing Laidlaw Envtl. Servs. (GS), Inc., B-245587.2, Jan. 16, 1992, 92-1 CPD ¶ 82, aff'd, B-245587.4, June 12, 1992, 92-1 CPD ¶ 513. Given the significant cargo commitments MSC is willing to make to one carrier under each RFP, and the substantial liquidated damages for failure to meet those commitments, MSC has a legitimate interest in negotiating better rates than it would otherwise have available under the Worldwide Agreements, and in obtaining better rates than carriers would generally offer their commercial clients for lower volume commitments. We thus have no objection to the agency's designating price ceilings here.

We have no basis to object to the agency's decision to not identify in the solicitations the specific service contracts it considers "comparable" to the contemplated contracts or to disclose the rates MSC intends to use in evaluating offers. FAR § 15.805-2 authorizes the contracting officer to select whatever price analysis techniques will ensure a fair and reasonable price, including comparing offered prices to previously-proposed prices for similar items or services, prior contract prices, published price lists, market rates, similar price indexes, and to the independent government estimate.<sup>10</sup> The solicitations at issue here simply announce that in determining price reasonableness the contracting officer, as authorized by the FAR, will compare offered rates with established commercial service contract rates. The protester has not cited, and we are unaware of, any requirement that an agency disclose to potential offerors the independent government estimate; prices obtained in previous competitions for similar items or services; price indexes or lists; or any other measure--such as the commercial service contracts at issue here--that an agency might use to determine whether offered prices are fair and reasonable.

The evaluation factors Sea-Land challenges are clearly intended to have an effect analogous to that of standard clauses generally included in solicitations for multiple-award Federal Supply Schedule (FSS) contracts requiring offerors to submit current published commercial price lists. The purpose of that requirement essentially is to ensure that offered prices for items listed on the FSS are reasonable. See Sanford's Domestic/Int'l Trade, B-226605, July 10, 1987, 87-2 CPD ¶ 33. The price list requirement

---

<sup>10</sup>These methods for determining price reasonableness have been used in MSC negotiated procurements. See, e.g., American President Lines, Ltd., supra.

assures that the prices on which offered discounts are based have been tested in the commercial marketplace and that those prices are sufficiently reasonable to generate sales of the required items. Id. The requirement is one mechanism that assures the agency that it obtains the best prices available from offerors.

Similarly here, the evaluation factors Sea-Land challenges simply afford MSC a mechanism to ensure that it obtains the best prices available from offerors when compared with one measure--commercial service contract rates. Such comparison may reasonably be made as long as the contracting officer takes into consideration significant differences in terms and conditions and other relevant factors in determining the "comparability" of the commercial contracts to the contracts contemplated by the solicitations. Since the essential terms of commercial service contracts that the agency might use for comparison are public information on file with the FMC, all offerors, including Sea-Land, have access to the same information upon which they can rely in developing proposals.

Requiring MSC to disclose in the solicitations which specific commercial contracts and rates it intends to use in evaluating proposals, as Sea-Land suggests, could be prejudicial to the competitive process since offerors could calculate their rates based upon the disclosed price information, rather than their costs, profit goals, and other objectives generally considered when preparing competitive proposals. Under Sea-Land's suggested approach, the agency could not be certain that the rates obtained are the best rates that offerors otherwise would have proposed without relying on the disclosed price comparison information. We simply have no basis to object to MSC's method of achieving its objective of obtaining better rates than carriers generally charge private shippers for significantly lower volume commitments.

#### Comparability of Service Contracts

Sea-Land argues that there are no "comparable" service contracts which MSC could reasonably use in evaluating offers. The protester essentially anticipates improper future action. The agency has provided our Office with copies of what MSC describes as "exemplar(s)" of comparable service contracts that MSC could use in evaluating offers. MSC asserts, however, that it does not "warrant" that those particular service contracts will be used by MSC in evaluating offers. Since the agency has not yet identified which

specific service contracts it will actually use in its evaluation, Sea-Land's contention that there are no comparable service contracts which MSC could use to evaluate offers--implying that, as a result, MSC will improperly evaluate proposals in the future--is premature. See General Elec. Canada, Inc., B-230584, June 1, 1988, 88-1 CPD ¶ 512. Consequently, there is no basis for us to consider this aspect of Sea-Land's protest at this time.

#### Additional Ambiguous Terms

Sea-Land also maintains that the phrase "similar service areas" in the RFPs is ambiguous in that it fails to convey sufficient information to allow intelligent preparation of offers. According to Sea-Land, that phrase is not a term of art and has no established trade usage. Given the specific origin-to-destination required by the solicitations, Sea-Land argues, the phrase "similar service areas" as used in the solicitations has no apparent import or connection to the requested rates. In addition, Sea-Land asserts that "it is possible that (service areas) is intended to refer to broad, or narrow, inland (domestic) and overseas cargo origin/destination zones." Sea-Land also alleges that the term "United States-flag carriers" as used in the solicitations is unclear. We find Sea-Land's arguments unpersuasive.

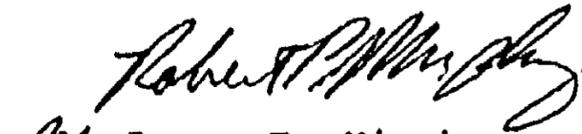
We have reviewed the parties' extensive arguments on this issue and, in our view, the terms identified by Sea-Land, when read in the context of these solicitations as a whole, are subject to only one reasonable interpretation. The term "United States-flag carrier" simply means any carrier operating United States-flag vessels, i.e., a documented vessel for which a valid Certificate of Documentation is outstanding. See 46 C.F.R. § 67.01-1 (1992).<sup>11</sup> The agency explains that the phrase "similar service areas" is intended to convey that the contracting officer will consider the solicitations's geographical coverage for domestic inland origin and foreign destination points in selecting a commercial service contract for comparison. Sea-Land's alternative interpretations that rather than referring to a geographic region, the phrase could also refer to similar

---

<sup>11</sup>46 C.F.R. § 67.01-3 states that "[d]ocumentation is required for the operation of vessels in certain trades, serves as evidence of vessel nationality, and with certain exceptions, permits vessels to be subject to preferred mortgages." Any vessel of at least 5 net tons which engages in fisheries, Great Lakes trade, or coastwise trade, must be documented. See 46 C.F.R. § 67.01-5.

"types of enhanced services," or that it is a "garbled reference to commodities similar to those listed on the solicitation," are simply illogical and inconsistent with the meaning of the phrase "similar service areas" when that term is read in the context of the solicitation as a whole. We find the agency's interpretation to be the only reasonable one.

The protests are denied.

  
for James F. Hinchman  
General Counsel